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IN THE

Supreme Court of the United States

October Term, 1965

No. 1041

SARA E. PENN, HELENA L. LEVINE, BARBARA PLISKOW, EDWARD M. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS McKENNA, MERYL CHATKIN, ISIDORE T. BLOOM, DAVID RIVERA, and SAUL GOTTLIEB,

Petitioners,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	7
Reasons for Granting the Writ	13
Conclusion	18
APPENDIX A—Opinions of the Appellate Term, First Department, Majority Opinion	1a
Dissenting Opinion	10a
APPENDIX B—Order Amending Remittitur	31a

CITATIONS

CASES:

Cox v. *Louisiana*, 379 U. S. 536 (1965) 18

Lombard v. *Louisiana*, 373 U. S. 267 (1963) 17

Terminello v. *City of Chicago*, 337 U. S. 1 (1949) 15

Constitutional Provisions and Statutes:

United States Constitution

First Amendment 3

Fourteenth Amendment 3

PAGE

New York Statutes

Penal Law

§514 ..... 4, 16

§701 ..... 5, 16

§722 (2) and (3) 5, 7

Civil Rights Law

§41 ..... 5, 16

§43 ..... 6, 16

Labor Law

§220-e (c) 7, 16

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Petitioners,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled case on May 20, 1965.

Citations to Opinions Below

The Court of Appeals affirmed the conviction of the defendants without opinion and its action is reported at 16 N. Y. 2d 581. The Appellate Term of the Supreme Court, from which the appeal to the Court of Appeals was taken, affirmed the convictions of the defendants in February, 1964, and that opinion is printed as Appendix A hereto, and is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 20, 1965. On September 23, 1965, the Court of Appeals denied a motion for reargument but granted a motion to amend the remittitur so as to reflect that it had necessarily passed on the contention of the defendants that their constitutional rights were violated. The order amending the remittitur is printed as Appendix B hereto. The action of the Court of Appeals in denying the motion to reargue and granting the motion to amend the remittitur is reported at 16 N. Y. 2d 872, 883, 884 (Sept. 23, 1965). The opinion of the Appellate Term printed here as Appendix A plainly reflects that the petitioners contended in that court that their constitutional rights had been violated and that those contentions had been adequately raised and preserved in the trial court.

On December 20, 1965, Mr. Justice Harlan granted an extension of time in which to file a petition for a writ of certiorari up to and including February 19, 1966.

The jurisdiction of this court is invoked under Title 28, United States Code, §1257(3).

Questions Presented

1. Whether persons who congregate to protest against the commission of a crime by labor unions practicing racial discrimination in violation of state statutes may constitutionally be convicted of disorderly conduct, if their congregating is intended to and has the effect of blocking the movement of the persons aiding and abetting the commis-

sion of a crime and such demonstration incidentally attracts the attention of passers-by.

2. Whether in determining if the conduct of demonstrators who obstructed the movement of certain persons was a criminal breach of the peace or an exercise of their rights of speech and assembly, the Trial Court could constitutionally refuse to receive evidence from law enforcement officials and other experts that the persons whose movements were obstructed were involved in the commission of crimes by virtue of practicing racial discrimination.

Constitutional Provisions and Statutes

United States Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

New York Statutes

Penal Law §514

Protecting civil and public rights

A person who: 1. Excludes a citizen of this state, by reason of race, color, creed, national origin or previous condition of servitude, from any public employment or employment in any capacity in industries engaged in defense contracts or from the equal enjoyment of any accommodation, facility or privilege furnished by innkeepers or common carriers, or by owners, managers or lessees of theatres or other places of amusement, or by teachers and officers of common schools and public institutions of learning; or,

2. Excludes a citizen of this state by reason of race, color, national origin or previous condition of servitude from the equal enjoyment of any accommodation, facility or privilege furnished by a cemetery association or associations;

3. Denies or aids or incites another to deny to any other person because of race, creed, color or national origin public employment or employment in any capacity in industries engaged in war contracts or the full enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, public conveyance on land or water, theatre or other place of public resort or amusement:

Is guilty of a misdemeanor, punishable by fine of not less than fifty dollars nor more than five hundred dollars. As amended L. 1918, c. 380; L. 1941, c. 478, §2; L. 1942, c. 438; L. 1942, c. 676, §2; L. 1943, c. 105, §5, eff. March 12, 1943.

Penal Law §701

Penalty for violation—Any person who shall violate any of the provisions of the foregoing section, or who shall aid or incite the violation of any of said provisions shall for each and every violation thereof be liable to a penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the person aggrieved thereby in any court of competent jurisdiction in the county in which the defendant shall reside; and shall, also, for every such offense be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, or shall be imprisoned not less than thirty days nor more than ninety days, or both such fine and imprisonment. Added L. 1941, c. 910, eff. April 30, 1941.

Penal Law §722

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

(2.) Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

(3.) Congregates with others on a public street and refuses to move on when ordered by the police;

Civil Rights Law

§41

Penalty for violation—Any person who or any agency, bureau, corporation or association which shall violate any of the provisions of sections forty, forty-a, forty-b or

forty-two or who or which shall aid or incite the violation of any of said provisions and any officer or member of a labor organization, as defined by section forty-three of this chapter, or any person representing any organization or acting in its behalf who shall violate any of the provisions of section forty-three of this chapter or who shall aid or incite the violation of any of the provisions of such sections shall for each and every violation thereof be liable to a penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the person aggrieved thereby or by any resident of this state, to whom such person shall assign his cause of action, in any court of competent jurisdiction in the county in which the plaintiff or the defendant shall reside; and such person and the manager or owner of or each officer of such agency, bureau, corporation or association, and such officer or member of a labor organization or person acting in his behalf, as the case may be shall, also, for every such offense be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, or shall be imprisoned not less than thirty days nor more than ninety days, or both such fine and imprisonment. As amended L. 1913, c. 265; L. 1918 c. 196; L. 1932, c. 234, §2; L. 1940, c. 9, §2; L. 1941, c. 893, §2; L. 1942, c. 478, eff. April 17, 1942 .

Civil Rights Law

§43

Discrimination by labor organizations prohibited—As used in this section, the term "labor organization" means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of

dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection. No labor organization shall hereafter, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of its race, creed, color or national origin, or by regulations, practice or otherwise, deny to any of its members, by reason of race, creed, color or national origin, equal treatment with all other members in any designation of members to any employer for employment, promotion or dismissal by such employer. Added L. 1940, c. 9, §1, amended L. 1945, c. 292, §5, eff. March 27, 1945.

Labor Law

§220-e (c)

That there may be deducted from the amount payable to the contractor by the state or municipality under this contract a penalty of five dollars for each person for each calendar day during which such person was discriminated against or intimidated in violation of the provisions of the contract;

Statement

Each of the defendants was convicted after joint trial of the offense of Disorderly Conduct, Penal Law §722 (2) and (3) in the Criminal Court of the City of New York and sentenced to pay a fine of $25 or serve five days in jail.

On the morning of August 1, 1963, the petitioners, associated with CORE, were picketing and demonstrating at the Rutgers Public Housing construction site on the

lower East Side of New York. After picketing for several days, at this site and elsewhere, to call attention to discrimination practiced in the building industry in violation of New York law, twice during the morning of August 1, at 10:00 and again at 11:00, various of the defendants sat down in the path on on-coming trucks and refused to leave when exhorted to do so by police officers, until they were placed under arrest. The People's evidence was made out by two truck drivers, Salvatore Kane (8-37)* and Paul Orlando (37-50). Kane identified petitioners Pitt, Penn, Pliskow and Levine as having sat down in front of his truck (10-13) and obstructed the movement of his truck for about fifteen minutes (15). They were neither loud nor boisterous but were singing (22-23). Later in the morning Kane made a second delivery to the construction site; he identified the petitioner Chatkin as having sat between the wheels of his truck at that time (26-28). Orlando identified petitioners Cannon and Rivera as having sat down in the path of his truck at the time he attempted to deliver concrete (38-39; 42, 46). Two police sergeants, Thomas Coyne (50-85) and Harold McCauley (85-136), identified petitioners McKenna, Gottlieb, Rivera (88-90), Pitt, Penn, Pliskow and Levine (53), Cannon and Ramos (96), Bloom and Chatkin (97), as taking part in the obstruction of the movement of the trucks. The defendants refused to comply with the directions of the police to desist, but when informed they were under arrest walked quietly to the patrol wagon, e.g., 96, 98.

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* Numbers in parentheses unless otherwise indicated refer to pages of the stenographic minutes of trial in the Criminal Court of the City of New York which have been filed as part of the record on this petition.

During these events a large detail of police, a number of newspaper reporters and photographers, and onlookers who fluctuated in number from 100 to 225 were in the neighborhood (98-99; 56, 64, 65, 71, 74). Vehicular traffic, some of which slowed to look and some of which was slowed by the blocked trucks, was kept moving by police officers (57; 99-100).

Mrs. Helena Levine, an instructor at New York University and a doctoral candidate in history, the wife of a physician (172-173), testified on behalf of the defendants, and it was stipulated that the other defendants would testify that they sat down at the places testified to by the People's witnesses for the purposes and with the intent stated by Mrs. Levine (192-196). She testified:

> "I intended to bring it to the attention of the authorities there was discrimination being practiced in the building trades unions, which was against the law, in violation of the law." (175)

Assistant New York State Attorney General Shirley Seigel, in charge of the Civil Rights Bureau (168-169), Madison Jones, Executive Director of the New York City Commission on Human Rights (142), and Professor Donald Shaughnessy of Columbia University (164-165), who for eight months conducted an investigation of the building trades unions in the city of New York at the behest of the New York State Advisory Commission to the United States Commission on Civil Rights, were all called as witnesses in an effort to show that the building trades unions working at the housing site involved were practicing discrimination

in violation of law. The Court refused to hear such evidence. Typically:

> "Q. Mrs. Seigel, has the attorney general's office conducted any investigation or inquiry into the subject of discrimination in the building trades unions?
>
> Mr. McGinley: Objection.
> The Court: Sustained." (171-172)

Ultimately the Court ruled that it was striking testimony "with reference to any findings they may have made as the result of studies" (209).

Harold Klorfine of the New York City Housing Authority testified as to the boundaries of this housing project and named unions among those represented in the construction—bricklayers, masons, lathers, carpenters, steamfitters, electricians, plumbers, sheet metal mechanics (157-164).

The petitioners were each convicted and sentenced to a twenty-five dollar fine or five days in jail, which has been paid or served.

The Appellate Term of the Supreme Court affirmed the conviction by a divided court. The majority viewed the defendants' conduct thusly:

> "The Court realizes that the defendants were motivated by a desire to dramatize the impairment of civil rights in the area covered by the activities of building trades unions in the construction industry, but it simply cannot justify their behavior. To condone their actions would constitute each one a judge of what law he will obey, depending upon his own personal convictions of right and wrong. Per-

mitting this would constitute an abandonment by society of the rule of law, give support to lawlessness and invite anarchy." App. A, *infra*, 9a.

Mr. Justice Hofstadter dissented. He found procedural irregularities in the joining of defendants. We abandon that ground and do not urge it upon this Court. He found, however, two other fatal flaws in the conviction. One related to the Trial Court's restrictions of the defendants' proofs:

> "The trial court committed substantial error in rejecting evidence concerning the existence and effect of racial discrimination in employment. Defendants' acts must be judged in the context of the demonstrations then taking place—and the right to demonstrate depended on the purpose of the demonstration (Giboney v. Empire Storage Co., 336 U. S. 490). Our Appellate Division said in Gaynor v. Rockefeller (21 A D 92): 'The racial policies of exclusion by some defendant unions * * * are of so long a duration and so widely known that the courts might, if they so elected, take judicial notice of the fact. * * * their policies bar respondents * * * from employment in particular categories. Establishing the contention as a factual truth, in a proper proceeding, would permit legal redress' (p. 100). If the fact of discrimination can serve as a predicate for redress in a civil proceeding, certainly it is relevant on such matters of wilfulness, *mens rea*, etc., in a criminal case. What a civil forum can take judicial notice of, surely is relevant in the context of the issue presented to a criminal court. The trial court's restriction of the defendants' proof was grievous, reversible error." App. A, *infra*, 16a.

The second flaw in the conviction was that judged in context the defendants' conduct was constitutionally protected.

> "And it is equally clear that the protest need not be ineffectual to be immune from penalty. It is inherent in the constitutional guaranty that protest may be sufficiently potent to bring the grievance to the attention of the public and government. (Thornhill v. Alabama, *supra,* at p. 96) The fact that the action was taken according to a preconceived plan does not make it unlawful if protected by the Constitution (Taylor v. Louisiana, 370 U. S. 154, 155-156); nor because of possible disorder by others (Henry v. City of Rock Hill, 376 U. S. 776).
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>
> Only 'when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears', the State may intervene (Cantwell v. Connecticut, supra, p. 308); absent these elements, the demonstration may not be arrested (Edwards v. South Carolina, 372 U. S. 229, distinguishing Feiner v. New York, 340 U. S. 315; Niemotko v.Maryland, 340 U. S. 268; Kunz v. New York, 340 U. S. 290; Matter of Rockwell v. Morris, 12 A D 2d 272, aff'd 10 N. Y. 2d 721, cert. den. 368 U. S. 913)."
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> • • •
>
> "In dealing with highly volatile forces 'not merely intellectual but also passionate,' the judiciary may not always find it possible to achieve a perfect solution in the interplay between dry legal considerations and dynamic social realities. It cannot always make infallibly correct judgments; it must content itself with 'splendidly imperfect' ones in the anguished choice among competing goods, in the effort to potentiate and perpetuate 'principles of humanity

and civil liberty' (Bram v. United States, 168 U. S. 532)." App. A, *infra*, 19a, 20a, 24a.

The Court of Appeals at 16 N. Y. 2d 581, subsequently affirmed without opinion.

Reasons for Granting the Writ

This is a sit-in case upside down. Unlike the cases arising from the South, petitioners here were not seeking to test or overturn an unconstitutional law or ordinance, they were not endeavoring to topple a prevailing social custom which enforced racial discrimination, abetted by the invidious application of apparently neutral criminal laws. Rather their purpose here was to invoke and activate the officials of the state of New York to do their duty as they had not under the law as it existed, to press the community, the police, the District Attorney, the City of New York, to conform their deeds to their words. As such, this case is possibly the first, but certainly not the last, to be presented to this court in a very different factual matrix from the ones which have concerned it in the past few terms. The effort in the North to make equal the access to life, liberty and the pursuit of happiness raises, and will continue to raise, pressing questions for this court as to the concrete meaning of the rights of free speech and assembly. The position of the District Attorney, acquiesced in by the Trial Court and approved by the reviewing courts, that it was irrelevant and hence inadmissible for the defendants to show that the trade unions employed at the site of the demonstrations were engaged in racial discrimination in violation of specific statutes, is little short of scandalous. If the petitioners had blocked traffic to a bordello or a gambling den it is inconceivable that the District Attorney

would urge that that sort of violation was recognized to be open and notorious; yet in his brief in the Court of Appeals the District Attorney states:

> "'* * * Indeed, discrimination in building trades unions 'are of so long duration and so widely known that the courts might, if they so elected, take judicial notice of the fact' (*Gaynor* v. *Rockefeller*, 21 App. Div. 2d 92, 100 [1st Dept. 1964]). Thus establishing that the protest was not speciously and maliciously grounded, proof of its truth was irrelevant to a defense of 'fair comment'." (Respondent's Brief in the Court of Appeals, pp. 24-25)

Similarly, the majority opinion in the Appellate Term (App. A, *infra*, 16a) indicates that the practice of racial discrimination by certain trade unions is so notorious as to be the subject of judicial notice. The inference that the District Attorney draws is that the criminal activities of the building trades unions in violating the laws of the state of New York are so well known that the demonstrations were not "maliciously grounded" but presumably sincere. The implication of the majority opinion in the Appellate Term is that the criminal activity of the building trades unions was so well known and so clearly violative of statutory law that for the defendants to interfere with those crimes in any way was a step down the road to anarchy. The true failure in this case is that of the police and the district attorney in making no effort to uphold laws supporting constitutional equal protection and arresting those who call this sad neglect of duty to the public attention. We suggest that the failure of public officials in this case, not the conduct of petitioners, leads to anarchy and disrespect for law. One of the purposes of the picketing was to exhort support of existing laws being ignored.

The conduct of the demonstrators was carefully designed in purpose and execution to focus on the illegal activities of the building trades unions. Insofar as the police sought to exhort them not to interfere with the activities of the building trades trucks, they ignored the police, but when the police invoked their authority to arrest the demonstrators they all peacefully submitted to arrest. The crowd was orderly, vehicular traffic was kept moving and there was, in fact, no impending disorder. The majority in the Appellate Term said that the acts of the demonstrators were likely to produce consternation and alarm and might have been "retaliated" by the truck drivers or others but for the presence of an adequate number of police (App. A, *infra*, 2a). Long ago this court in *Terminello* v. *City of Chicago*, 337 U. S. 1 (1949), rejected the notion that potential retaliation by those who find speech offensive may be used to set at nought the speaker's right to express himself. Whatever quarrel the contractor or the building trades unions might have with the defendant, the *public* peace was not disrupted, and any threat to the public here present, only a speculative potential, came from the possible improper response of bystanders.

What is most clearly displayed by this case, as much in its progress through the courts as in its birth at the public housing project, is an unreasonable and racially discriminatory attitude towards two sets of laws. The disorderly conduct section of the New York State Penal Law is applied with a Javert-like rigidity to a situation in which there was a trifling slowup of vehicular traffic, easily managed by police (57, 69), and a gathering of a crowd of spectators (70-71; 98-100). This kind of disruption in every other kind of circumstance is approved by municipal authorities;

it occurs dozens of times a day when cranes or other marvelous engines of construction move through the city streets to the sites of new buildings, momentarily blocking traffic and attracting by-standers. The result is something commonly called progress.

The second set of laws, declaring and protecting the rights of the citizens, §§514 and 701 of the Penal Law, Civil Rights Law §§41 and 43, and Labor Law §220-e (c), are treated not as legislative enactments but as source material for after-dinner speeches. The police, the District Attorney and the courts, all simply saw fit to ignore those laws and to treat violations of them as irrelevant. The indifference of the authorities to the violations of the laws designed to protect the civil rights of all the citizens is, itself, a measure of the appropriateness of the forum in which the demonstrators chose to communicate their ideas, and the reasonableness of the method they took. These facts exhibit not only the indifference of the police and the District Attorney to violations of law at the site of the picketing, but since the project was a public one, we see also the failure of the great city to carry out its duty to protect all citizens equally.

As Mr. Justice Hofstadter pointed out so vividly, *supra*, at 12, the communication of ideas need not be ineffectual to be protected. It is inconceivable that a citizen who chased a bank robber through the streets should be prosecuted for disrupting the traffic, or that citizens who blocked a delivery truck containing heroin would be punished for attracting a crowd. The difference between those hypothetical cases and the case at bar is that the laws against bank robbery and narcotics trafficking are taken seriously and the laws against racial discrimination are not. The

former are given medals for their bravery while petitioners were arrested for their pains.

In seeking review here we ask this court to give those who demonstrate in the North in *favor* of the application of local laws, which are in harmony with our Constitution, without creating violence or disturbance, the same recognition of their rights to do so that is given to those who in the South demonstrated *against* local laws in conflict with our Constitution.

We urge that this Court consider whether or not arrests, causing only minimal discomfort to a city, no more than commonly happens in New York from many causes, can be constitutionally sustained when such arrests stem from peaceful protests against unequal and discriminatory upholding of laws in support of constitutional equal protection. We suggest that this case is not unlike *Lombard* v. *Louisiana,* 373 U. S. 267 (1963); the public discomfort was hardly greater and the official support in favor of discriminatory treatment no less, accordingly the arrests are no less improper and unconstitutional.

We ask this court to hold that, as a minimum, trial courts in deciding breach of the peace cases must consider, and cannot reject, testimony showing that racial discrimination in violation of positive law is being practiced by those at whom the demonstration is pointed. The relevance of such testimony concerns not merely the "sincerity" of the demonstrators. Such testimony is crucial to the decision as to whether the state is reasonably exercising its power to maintain order, or arbitrarily suppressing efforts by its citizens to focus attention on the scandalous neglect of its officials to enforce the law. While the police may not be held to a detailed accounting of their enforcement of every

criminal statute, when such police conduct shows a pattern of behaviour opposed to the enforcement of laws supporting equal protection of the law then such excluded testimony is relevant to the question of the constitutional propriety of the arrests.

At no point do we argue that *any* sort of conduct is permissible by petitioners merely because of improper police denial of equal protection of the laws. We do say, however, that the right of public to be free of minimal discomfort must give way to the right of protest in favor of the upholding of the laws against discrimination. Time and again this Court has supported the temporary discommoding of some people where the greater right of peaceful protest had to be maintained. *Cox* v. *Louisiana,* 379 U. S. 536 (1965).

We respectfully submit that these questions will persist until answered, and that it is in the interests of all of the citizens and of the orderly administration of justice that this court hear and decide them.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

February 1966

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APPENDIX A

The Opinions of the Appellate Term, First Department
Majority Opinion by Capozzoli, *J.*

The instant appeal arises out of incidents of alleged disorder connected with a racial protest by these defendants against illegal discrimination in the building trades unions. These incidents occurred on Rutgers Street and on an access road leading to a wire fence containing the entrance to a building site where public housing was in the course of construction.

On the basis of the evidence adduced at the trial, the Court below found that these defendants darted into the path of trucks which were delivering construction material; some of them sat in front of and under the wheels of the trucks and others sat in front of the gate leading to the housing site itself. These actions interfered with the movements of the trucks so that they came to a complete stop and they were prevented from proceeding to their destination. The evidence also established that the defendants refused to obey the instructions of the police to move out of the way so as to allow the trucks to proceed. On the basis of the total evidence adduced the Court found all the defendants guilty of a violation of Sec. 722, Subds. 2 and 3 of the Penal Law of the State of New York (disorderly conduct).

It is the contention of the defendants on this appeal that the evidence in the court below was insufficient to support the convictions; that they are protected by the First and 14th Amendments to the Constitution of the United States and that Sec. 722 of the Penal Law has no application to their actions.

There was no real dispute below as to the evidence. The defendants admitted that they deliberately placed them-

selves in sitting positions before the entrance gate to the building site and also on the street, directly in front of the trucks and the wheels thereof. There is no dispute that their "sit-down" conduct stopped and prevented the trucks from entering the site.

Such conduct was not normally to be anticipated. It constituted a disturbance of the public order by acts likely to produce violence and cause consternation and alarm. There is enough shown from which it can reasonably be seen that, had an adequate number of police not been present, the conduct of the defendants might have been retaliated by the truck drivers or others with serious consequences to the peace of the community.

The further conduct of the defendants in refusing to remove themselves from their obstructionist sitting positions, after repeated requests and entreaties by the police officers and after being repeatedly warned by the police that the conduct of the defendants violated the law and that they could be arrested therefor, were all calculated to, and did in fact, violate Sec. 722. There is no question but that the defendants, by their conduct and acts, annoyed, disturbed, interfered with and obstructed others (the truck drivers) by acts likely to produce violence and cause consternation and alarm, all of which tended to a breach of the peace. (Penal Law, Sec. 722, subd. 2.) They also violated subd. 3 of the statute by congregating on a public street and refusing to move on when ordered to do so by the police.

A review of the record below discloses ample evidence to justify the convictions of the defendants.

The defendants strongly contend that their actions were legal and not subject to prosecution, because they desired to dramatize the impairment of civil rights by labor unions in the building trades, and to call attention to acts of discrimination by them against negroes. They further argue that they were engaged in a peaceful protest against these acts of discrimination and were engaged in an effort to have the laws prohibiting discrimination enforced. That in doing so, they maintain, they are protected by the United States Constitution as a proper exercise of free speech, proper exercise of the rights of public assembly and to petition for redress of grievances under the First and 14th Amendments. In support of their position they cite the cases of Edwards v. South Carolina, 372 U. S. 229 (1963); Shuttlesworth v. Birmingham, 373 U. S. 262 (1963); Peterson v. Greenville, 373 U. S. 244 (1963); Johnson v. Virginia, 373 U. S. 61 (1963) and Lombard v. Louisiana, 373 U. S. 267 (1963).

An examination of those cases discloses that the reliance by the defendants upon them is entirely misplaced. The facts in the case at bar are so obviously different from the facts in all of the last cited cases as to render the sound holdings of those cases clearly inapplicable to the behavior of these defendants.

This Court is not faced with an orderly, quiet lunch-counter sit-in which violates an unconstitutional city ordinance requiring the separation of the races in restaurants (Peterson v. Greenville, supra); or which violates an "official command which has at least as much coercive effect as an ordinance" and which directs the continuance of segregated services in restaurants (Lombard v. Louisiana,

supra, p. 273); nor is the Court dealing with a conviction for aiding and abetting persons to engage in an orderly sit-down demonstration (Shuttlesworth v. Birmingham, supra); neither is the Court dealing with a contempt conviction which rests upon a negro's refusal to comply with the segregated seating requirements observed in a courtroom (Johnson v. Virginia, supra); wherein petitioner was held in contempt for being "peaceably seated in the section reserved for whites" (p. 62). Nor do we have the situation which was presented in Edwards v. South Carolina, supra, where there was an assembly of negroes to peaceably express their grievances and where the court specifically found that "there was no violence or threat of violence" and further found "there was no obstruction of pedestrian or vehicular traffic * * * no vehicle was prevented from entering or leaving * * * the area of the demonstration" (pp. 231, 232).

As against these last cited cases let us consider the case of People v. Stover, 12 N. Y. 2d 462. In that case defendants placed a clothes-line filled with old clothes and rags in the front yard of their home, in violation of an ordinance of the City of Rye prohibiting the erection and maintenance of clothes-lines or other devices for hanging clothes in a front or side yard abutting a street. When prosecuted therefor the defendants urged, amongst other things, that the ordinance was unconstitutional and that it interfered with their right of free speech as guaranteed by the First Amendment. In passing upon this contention of the defendants the Court said:

> "* * * This form of nonverbal expression is, we shall assume, a form of speech within the meaning of the First Amendment. (Citing cases) However, it is perfectly clear that, since these rights are neither absolute nor unlimited (citing cases), they are subject to such reasonable regulation as is provided by the ordinance before us. Although the city may not interfere with nonviolent speech, it may proscribe conduct which incites to violence or works an injury on property, and the circumstance that such prohibition has an impact on speech or expression, otherwise permissible, does not necessarily invalidate the legislation."

In the case of Trans-Lux Distributing Corp., v. Board of Regents, etc., 14 N. Y. 2d 88, at p. 91, the Court said:

> "* * * while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State Labor laws that are not themselves designed as restrictions on freedom of speech (citing case). Conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (Giboney v. Empire Storage Co., 336 U. S. 490.)"

The holding in the last two cited cases is directly contrary to the position taken by the defendants.

In the case of Gaynor, et al., v. Rockefeller, et al., 21 App. Div. 2d 92, the unanimous opinion of the Court indicated that racial policies of exclusion by some of the building industry unions "are of so long duration and so widely known that the courts might, if they so elected, take judicial notice of the fact * * * (p. 100). The Court then indicated

that the law provides punishment for business or labor organizations which discriminate unlawfully, citing Penal Law, Secs. 514 and 701; Civil Rights Law, Secs. 41, 43; Labor Law, Sec. 220-e, Subd. c.

It is, therefore, apparent that these defendants had legal avenues open to them to bring about the objectives they seek.

While it is true that the Supreme Court of the United States has held that public grievances are within the constitutional protection of the First Amendment, it has also held that the manner of protest is subject to reasonable regulation and control in the interest of public safety and order. (Cox v. N. Hampshire, 312 U. S. 569; Giboney v. Empire Storage, 336 U. S. 490; Cantwell v. Conn., 310 U. S. 296). Also see: People v. Galamison, 43 Misc. 2d 72; People v. Martin, 43 Misc. 2d 355.

In Cox v. N. Hampshire, supra, at p. 574, The Court said:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illuustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right

> which in other circumstances would be entitled to protection. * * *".

In Giboney v. Empire Storage Co., supra, at p. 498, the Court said:

> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to * * * conduct in violation of a valid criminal statute. We reject the contention now. * * *".

In Cantwell v. Connecticut, supra, at page 308, the Court said:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. * * *".

In People v. Martin, supra, at p. 357, the Court said:

> "Thus, although the Supreme Court has decreed that the Fourteenth Amendment prohibits a State from making criminal the peaceful expression of 'unpopular views', this does not imply that persons wishing to exercise the right to express their views may comport themselves in a manner which will

constitute disorderly conduct as defined in our penal statutes."

The defendants attempted to equate their actions with peaceful picketing. Of course, if they were engaged in peaceful picketing, the actions of the police in arresting them would have been illegal. But were they engaged in peaceful picketing? That term implies peaceful, non-provocative. Can it honestly be contended that the acts of the various defendants, in placing themselves under wheels of the trucks and otherwise interfering with the progress of the trucks, were peaceful? Is it seriously claimed that such behavior would not tend to possible violence on the part of those against whom these acts were directed and thereby breach the peace? These questions pose their own answers.

The defendants argue that, since their purpose was to bring to the attention of the public and the authorities acts of a discriminatory nature, they had a perfect right to perform the acts of which they stand convicted, despite the prohibition of laws, and no convictions may result therefrom. Certainly this Court is sympathetic with the objectives which these defendants sought to achieve and it recognizes the justness of their cause and their well-intentioned motives. However, this Court is limited as to the power it may exercise in the case at bar. It can only review the record and base its conclusion upon that record within the law as it is applicable thereto. It cannot engage in a dissertation of the philosophical and sociological questions which would be raised by a consideration of the objectives which these defendants sought to attain by engaging in acts which violated the law. It can only apply the existing law to the facts found below. If the evidence

shows a violation of the law by these defendants, then the reason why they broke the law is immaterial and irrelevant.

The Court realizes that the defendants were motivated by a desire to dramatize the impairment of civil rights in the area covered by the activities of the building trades unions in the construction industry, but it simply cannot justify their behavior. To condone their actions would constitute each one a judge of what law he will obey and what law he will not obey, depending upon his own personal convictions of right and wrong. Permitting this would constitute an abandonment by society of the rule of law, give support to lawlessness and invite anarchy.

Civil rights can be as much endangered by illegal methods used in an attempt to gain them, as they are by those who would deny them altogether.

The dissenting opinion criticizes the joint trial of these defendants by the trial court and concludes that it resulted in a denial to the defendants of a fair trial. A number of cases are cited in support of this conclusion. An examination of those cases discloses that in some what was considered was not joinder of defendants, but joinder of counts and in the others the facts are entirely dissimilar from the facts in the case at bar. The fact is that every defendant stipulated with the People to hold a joint trial and the record clearly shows that every defendant was convicted on the basis of the particular evidence adduced against his own actions. It is interesting to note that this point is not raised on this appeal by any of the defendants.

For the reasons hereinabove expressed the convictions against all of the defendants are affirmed.

Dissenting Opinion by Hofstadter, *J.*

HOFSTADTER, J. (Dissenting):

I dissent and vote to reverse the judgments of convictions.

I know that my bretheren [sic] not only are tolerant of opposing views in themselves but cordially embrace the free expression of them. Indeed, such freedom of expressing all viewpoints, whether acquiescent of [or] dissident, is not only a duty but the reward of service in a multiple court.[1] In an ancient and highly developed system of law, it was a rule that a court that was uniformly unanimous was one to be shunned—it was dissolved and its membership reconstituted. In our country dissent is regarded as salutary for the development of sound judicial principles—yesterday's dissenter may be tomorrow's majority.

In a notable dissent in Malloy v. Hogan (U. S. —; 84 S. Ct. 1489) Mr. Justice Harlan declared: "Believing that the * * * court's decision carries extremely mischievous, if not dangerous consequences, * * * I must dissent. The importance of the issue presented and the serious incursion which the court makes on * * * basic constitutional principles justifies a full exposition of my reasons." I regard this expression as apposite here.

Eleven defendants tried together in an omnibus trial—though none was charged with acting in concert or congregating with any of the others—have been convicted of disorderly conduct (Penal Law, §722 [2, 3]).[2]

In a case involving demonstrations by Bronx housewives against the seller of bread at alleged exorbitant prices—in the depression year 1934—I took occasion to observe: "The right of an individual or group of individuals to protest in a peaceable manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well-ordered society. It is an essential prerogative of free men living under democratic institutions. And it is salutary for the State in that it serves as a safety valve in times of stress and strain." (Julie Baking Co. Inc. v. Graymond, 152 Misc. 846, 847). If this was a novel proposition when uttered, it soon ceased to be such with the authoritative pronouncement by the U. S. Supreme Court—in 1940—in Thornhill v. Alabama, 310 U. S. 769.

Such freedom of expression nourishes the spirit and practice of civility. Man's instinctive urge to violence is thus conducted into peaceful channels.[3] "Freedom of expression is the well-spring of our civilization" (Dennis v. United States, 341 U. S. 494); and in Jefferson's felicitous phrase this includes "* * * the arraignment of all abuses at the bar of public reason." "When the channels of opinion and of peaceful persuasion are corrupted or clogged, * * * political correctives can no longer be relied on and the democratic system is threatened at its most vital point." (Jackson, The Struggle for Judicial Supremacy, 1949 Ed., p. 285)

The First Amendment is the "matrix, the indispensible condition of nearly every other form of freedom." (Palko

v. Connecticut, 302 U. S. 319, 327). Its fundamental guarantees of freedom of speech, of press, of the people to assemble peacefully and to petition for the redress of grievances, were the first of the Bill of Rights to be secured from state abridgment by the "due process" clause of the Fourteenth Amendment (DeJonge v. Oregon, 299 U. S. 353; Grosjean v. American Press Co., 297 U. S. 233; Gitlow v. New York, 268 U. S. 652; Hague v. C. I. O., 307 U. S. 496; see also Steelworkers v. Labor Board, 376 U. S. 492 and Sullivan v. Times, 375 U. S. 803). The counterpart of the great canon is to be found in our State Constitution—Art. I, §§8, 9.

In this light, the convictions here are ill founded—the demonstrators against notorious and long-standing racial discrimination were within constitutional protection. Moreover, properly construed and applied, the statute against disorderly conduct was not violated. Finally, procedural irregularity and substantial error on the trial, in any event, vitiate the judgments. Preliminary to dealing with these matters—in inverse order—let us look at the record.

The incidents complained of occurred on August 1, 1963, approximately an hour apart—at about 10:00 A. M. and 11:00 A. M.—at the site of a gate leading to a public housing project then under construction at Madison and Rutgers Streets in Manhattan. Picketing had commenced at about 6:00 A. M. A large detail of police were present. By ten o'clock members of the public were across the street, and press reporters and photographers were in the area. Wooden "horses" were used as boundary markers of the picketing permitted by the police. From Rutgers Street a

private access road or driveway led to a wire fence containing the entrance gate to the project. The gate was kept closed except to give entry to vehicles. Rutgers Street traffic was not impeded. While passing vehicles slowed down to observe what was going on, officers in the street expedited their movement to keep the roadway clear.

To traffic in clarity, we must divide the defendants into two groups; and the interests of justice require a further particularization of the individual acts of the several defendants. Defendants Penn, Pitt, Pliskow and Levine partook of the incidents at 10:00 A. M.—and they were arrested shortly after that hour. Defendants Cannon, Ramos, McKenna, Chatkin, Bloom, Rivera and Gottlieb partook of the incidents at 11:00 A. M.—and they were arrested thereafter. The acts of the defendants differed!

The ten o'clock incidents all took place in front of the fence bordering the project. As a cement-mixing truck on the driveway approached the gate, defendants Levine, Penn, Pliskow and Pitt sat down in front of the fence. Only one —possibly two—of these defendants sat in front of the gate; neither of the others did so. All were some fifteen feet from the truck. A photograph (Exhibit 1) shows all these defendants sitting quietly, doing nothing. The driver of the truck testified that he heard no loud or boisterous language —they were singing. He remained in the truck when the defendants were requested to leave. Upon their refusal to do so, they were arrested and walked quietly to the police wagon.

The entire episode had taken about fifteen minutes. The driver had been inconvenienced briefly; the police were not

opposed. The incidents took place not on the public street but on a private driveway. There was no actual breach of the peace—nor reasonable apprehension of it!

Further clarification requires that the "eleven-o'clock" defendants now be subdivided. Two defendants sat and one defendant lay in the private driveway leading to the fence; but there was no truck or other vehicle using the driveway at the time. Two defendants sat down in front of a cement truck in the street. Several minutes later a second cement truck arrived and stopped behind the first one in the street. After this second truck, stopped not by the pickets but by the first truck, had come to a halt, the last two defendants sat down in front of the second truck. Again the defendants were told to move, were arrested when they remained silent and, without resisting arrest, walked quietly to the patrol wagon. None had used loud or boisterous language—in fact, they had remained silent—and no breach of the peace occurred. The vehicular traffic had not stopped, having been routed around the trucks by the police. Again, there was no breach of the peace nor reasonable apprehension of it.

As to defendants Ramos and Rivera, there was confusion on the trial concerning their identification; prosecution witnesses placed them in different places at the same time. It was inevitable that when the trial ended this confusion still obtained; it was compounded by like factors.

The evidence applicable to the eleven-o'clock incidents obtruded itself to tell against the defendants concerned in the ten-o'clock occurrence—and conversely. With the best of intentions, it was impossible to judge each defendant on

his own several acts; rather he was judged in a much broader frame of evidential reference. This resulted in an adjudication of a species of guilt by association. Hence, the collective trial and condemnation of the defendants were inadmissible in principle and violative of statutes (Code of Crim. Proc., SS 278, 279, 391; People v. Fringo, 13 A D 2d 887; People v. Namolik, 8 A D 2d 685; People v. Morett, 272 App. Div. 96; People v. Kanze, 200 Misc. 907; see also Allen v. Grella, 4 Misc. 2d 93).

To be sure, counsel had stipulated that the defendants be tried together; this was on condition, however, not only that separate verdicts be rendered in each case, but that the testimony would be applied to each defendant only to the extent that it in fact applied to him. We have seen, however, that this became virtually impossible. There were four categories—contingents—of defendants who were tried together—not even multiple individuals concerned with parallel acts during a single event. In this fact pattern, the misjoinder was so highly prejudicial and abortive of a fair trial that the interests of justice require reversal (Code of Crim. Proc., §527; People v. Namolik, supra; People v. Lombard, 4 A D 2d 666; People v. Connors, 13 Misc. 582). "Prejudice has consistently been held to occur when • • • (joinder) embarrasses or confounds an accused in making his defense" (Pointer v. U. S., 151 U. S. 396, 403, quoted in Cross v. U. S., U. S. D. C., N. Y. L. J., Vol. 152, #3, p. 1).

The stipulaltion of counsel does not save the result from condemnation; it cannot avail. Our competence supercedes it—our duty transcends it! Indeed, the vice inhered in the stipulation itself—it tainted the judgment *ab initio.!*

The trial court committed substantial error in rejecting evidence concerning the existence and effect of racial discrimination in employment. Defendants' acts must be judged in the context of the demonstrations then taking place—and the right to demonstrate depended on the purpose of the demonstration (Giboney v. Empire Storage Co., 336 U. S. 490). Our Appellate Division said in Gaynor v. Rockefeller (21 A D 2d 92): "The racial policies of exclusion by some defendant unions * * * are of so long duration and so widely known that the courts might, if they so elected, take judicial notice of the fact. * * * their policies bar respondents * * * from employment in particular categories. Establishing the contention as a factual truth, in a proper proceeding, would permit legal redress" (p. 100).[5] If the fact of discrimination can serve as a predicate for redress in a civil proceeding, certainly it is relevant on such matters as wilfulness, *mens rea,* etc., in a criminal case. What a civil forum can take judicial notice of, surely is relevant in the context of the issue presented to a criminal court. The trial court's restriction of the defendants' proof was grievous, reversible error.

Dealing with substantive matters, it is manifest that the defendants' acts, judged severally as they must be, did not constitute disorderly conduct under the statute. They did not act in such manner as to cause a "disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community" (People v. Most, 171 N. Y. 423, 429). The conduct sought to be deterred by the Penal Law must be considerably more serious than innocent or inoffensive action (People v. Carcel,

3 N Y 2d 327). Inconveniencing pedestrians, or vehicular traffic for that matter, does not suffice (People v. Nixon, 248 N. Y. 182, 187, 187-88); nor does lack of manners or good taste (ibid. p. 185). In this setting, only acts which, in the context of purpose, time, place and circumstances of the acts, would, if not stopped, actually engender a breach of the peace are within its ambit (People v. Perry, 265 N. Y. 362, 364; Bouie v. City of Columbia, — U. S. — 84 S. Ct. 1697. Otherwise, they are not to be so held (People ex rel. Clark v. Keeper of N. Y. State Reformatory, 176 N. Y. 465).

The complaint[6] was not established by the proof—and, on the proof, there was no likelihood of a breach of the peace or disorder. Defendants were said to have obstructed traffic; yet seven of the eleven defendants were not on a public street, they sat in a private driveway; two others sat before a truck which had theretofore come to a halt—and traffic was not seriously hampered. Defendants were charged with using loud and boisterous language; yet the proof was diametrically to the opposite. Defendants were accused of causing a crowd to collect; yet the evidence showed that the spectators had gathered long before either set of arrests. Their mere presence does not, of course, import punishable conduct within the meaning of section 722. In our metropolis, crowds are daily present to hear speakers, to watch a parade, to satisfy curiosity (People v. Kieran, 6 Misc. 2d 245, 266). No violence occurred and none was threatened; and the numerous police were there since early that morning—they were not called because of the defendants' acts. When arrested, the defendants submitted peacefully.

Thus, fairly evaluated, the record utterly fails as an adequate predicate for a conviction under the statute. As a matter of law, guilt under it was not established in point of fact beyond a reasonable doubt. If this represents a strict view of the evidence and of the law, it is indicated in criminal cases; that course uniformly has been followed by this Court. It is also becoming in an area of grave human concern.

In any event, we are constrained by supreme authority to nullify these convictions—the defendants' conduct came within the protective shelter of the First Amendment—whatever view we might otherwise have taken of it under our State Statute. (I do not doubt that the Court of Appeals would reach the same conclusion under our state constitutional provision. Art. I, §§8, 9.)

We have been instructed that in interpreting a general statute regulating public conduct we are required to "resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion' ". (Downum v. U. S., 372 U. S. 734, 738). And that "a generally worded statute, when construed to punish conduct which cannot be constitutionally punished, is unconstitutionally vague." (Wright v. Georgia, 373 U. S. 284 at p. 293; see, also, Cafeteria Employees Union Local 302 v. Angelos, 320 U. S. 293; Stromberg v. California, 283 U. S. 359; People v. Muller, 286 N. Y. 281; Senn v. Tile Union, 301 U. S. 468). No construction of a statute is admissible which involves an inhibited application. An otherwise constitutional enactment may not be unconstitutionally enforced!

Hence, the orders of policemen could not make the conduct of the defendants, otherwise lawful, unlawful. "One cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." (Wright v. Georgia, supra, at pp. 291-292; Henry v. City of Rock Hill, 376 U. S. 776; see, also, Lombard v. Louisiana, 373 U. S. 267; Shuttleworth v. Birmingham, 373 U. S. 262; Johnson v. Virginia, 373 U. S. 61; People v. Galpern, 259 N. Y. 279, 281).

And it is equally clear that the protest need not be ineffectual to be immune from penalty. It is inherent in the constitutional guaranty that protest may be sufficiently potent to bring the grievance to the attendance of the public and government. (Thornhill v. Alabama, *supra*, at p. 96.) The fact that the action was taken according to a preconceived plan does not make it unlawful if protected by the Constitution (Taylor v. Louisiana, 370 U. S. 154, 155-156); nor because of possible disorder by others (Henry v. City of Rock Hill, 376 U. S. 776).

Where abridgement of freedom of speech is asserted, the Court must be scrupulous to examine the effect of the challenged arrest on this basic right (see Schneider v. State of New Jersey, 308 U. S. 147, 161). "In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." (Cantwell v. Connecticut, 310 U. S. 296, 304). *The issue, in each case, must be resolved whether the State interest has been pressed "to a point where it has come into fatal collision with the overriding interest protected by the federal compact"* (ibid. p. 307, emphasis supplied).

Only "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears", the State may intervene (Cantwell v. Connecticut, supra p. 308); absent these elements, the demonstration may not be arrested (Edwards v. South Carolina, 372 U. S. 229, distinguishing Feiner v. New York, 340 U. S. 315; Niemotko v. Maryland, 340 U. S. 268; Kunz v. New York, 340 U. S. 290; Matter of Rockwell v. Morris, 12 A D 2d 272, aff'd 10 N. Y. 2d 721, cert. den. 368 U. S. 913).

Edward v. So. Carolina, *supra,* decided last year, has several points of striking similarity to the facts before this Court. One hundred and eighty-seven students engaged in a protest march to the State House grounds. They walked around the grounds for approximately 45 minutes, carrying placards. Vehicular traffic at a nearby street intersection was slowed down and an officer was dispatched to keep traffic moving. There were 200 to 300 onlookers, but no evidence of violence was reported. Police protection at the scene was sufficient to meet any forseeable possibility of disorder. When the students were asked to leave, they refused and began to sing and were arrested. The Supreme Court ruled that although their conduct constituted a breach of the peace under State Law, the convictions infringed the students' constitutional right of free speech, free assembly and freedom to petition for redress of grievances, and reversed the convictions. (Followed in Fields v. So. Carolina, 375 U. S. 44; s. c. 372 U. S. 522.)

The true import of Edwards may be found in Henry v. Rock Hill, *supra,* wherein the Court stated at pp. 777-778:

"We now think Edwards and Fields control the result here. As in those cases, the petitioners here, while at a place where the state's law did not forbid them to be, were engaged in the 'peaceful expression of unpopular views' (Edwards v. South Carolina, 372 U. S. at 237). They assembled in a peaceful, orderly fashion in front of the City Hall to protest segregation. They carried signs to that effect and they sang patriotic and religious songs. Although white onlookers assembled, no violence or threat of violence occurred and traffic was not disturbed. After fifteen minutes of this, they were arrested for failure to disperse upon orders. Here, as in Edwards and Fields, petitioners 'were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court "not susceptible of exact definition" ' (ibid.). And here as there 'they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community as to attract a crowd and necessitate police protection' (ibid)."

These cases foreshadowed the complex of decisions rendered by the Supreme Court in June of this year: Bouie v. City of Columbia, — U. S. —; 84 S. Ct. 1697; Barr v. City of Columbia, — U. S. —; 84 S. Ct. 1734; Bell v. Maryland, — U. S. —; 84 S. Ct. 1814; Griffin v. Maryland, — U. S. —; S. C. 1770; Robinson v. Florida, — U. S. —; 84 S. Ct. 1693. In *Bouie,* the Court, by vote of 6 to 3, set aside the 1960 South Carolina sit-in convictions of two Negro students, five Justices holding that the students had had no fair warning that the state trespass law, prohibiting entry after warning, also applied to failure to leave after request.

In *Barr*, the Court unanimously reversed for lack of evidence the conviction of five South Carolina sit-in students for breach of the peace. In *Bell*, the Court by vote of 6 to 3, vacated the 1960 trespass convictions of 12 sit-in demonstrators at a Maryland restaurant, five Justices holding that the Maryland courts should have a chance to re-examine the convictions in light of subsequent passage of state public accommodations laws and the sixth finding their arrest and conviction unconstitutional. In *Griffin* the Court by vote of 6 to 3, set aside the trespass convictions of five Negroes who sat in at a Maryland amusement park, five Justices resting on the fact that a county deputy sheriff—an agent of the state—was employed by the park to carry out its policy of discrimination. In *Robinson*, the Court unanimously reversed the trespass convictions of 18 Florida restaurant demonstrators because state policy of segregation was embodied in a regulation requiring restaurants to have separate white and negro washrooms.

The determined intent of the High Court is unmistakably clear. Whatever the variant syntactic, juristic or philosophic patterns of these cases—and whatever the immediate context—their essential thrust—and reach—are the same; an otherwise valid state proscription is unavailing—in enforcement—when it collidies with a First Amendment guaranty made obligatory on the States by the due process clause of the 14th Amendment. Mr. Justice Brennan, writing in Malloy v. Hogan, — U. S. — 84 S. Ct. 1489, at the same Term for the majority, summed it up: "Gitlow v. New York (268 U. S. 652) initiated a series of decisions which today holds immune from state invasion every First

Amendment protection for the cherished rights of mind and spirit—the freedoms of speech, press, religion, assembly, association, and petition for redress of grievances".

"Construction of the Federal Constitution by the Supreme Court of the United States is binding on all State Courts" (People v. Muller, 286 N. Y. 281, 284). Imbued with a sense of loyalty, a State's judiciary, to which is entrusted the high responsibility of enforcing its laws, may find it difficult to assimilate this view. But, adopting Josiah Royce's exquisite formulation of the imperative of "loyalty to loyalty" it becomes its bounden duty to follow the "supreme law of the land" which preempts any other.[7]

A reading of the cases leads me to the inescapable conclusion that irrespective of any view which may be taken of errors on the trial, its procedural irregularity or the sufficiency of the evidence—and I firmly believe they invalidate the convictions—in any even[t], we must reverse the convictions against these defendants on constitutional grounds.

I am loath to close—lest it seem to my brethren that I have overlooked certain matters which I know they deem important. I would render it explicit that I have not ignored them. Every art in its execution requires a discriminating elimination—care must be taken to leave out nothing vital yet leave out more than is retained. The judicial discipline is an art—infinitely more than a mechanistic operation of science—which demands restraint in certain areas at certain times in the context of need. The law is replete with ambivalence in the articulation of its principles—arising from a practical regard for the actions of mankind. It may not shrink, therefore, from a corresponding moderation in

the application of those principles. The dichotomy of the quest and the ideal is often resolved by aspiring to approximation, not perfection—in what Paul Tillich calls "the ambiguity of perfection"—an adjustment to "a world of words, and compromises, and niceties of conduct."

In dealing with highly volatile forces "not merely intellectual but also passionate," the judiciary may not always find it possible to achieve a perfect solution in the interplay between dry legal considerations and dynamic social realities. It cannot always make infallibly correct judgments; it must content itself with "splendidly imperfect" ones in the anguished choice among competing goods, in the effort to potentiate and perpetuate "principles of humanity and civil liberty" Bram v. United States, 168 U. S. 532).

For, as it has been said, there is no history without tears—and history is being written, re-written. Nor is there any mechanical yardstick—legal or otherwise—by which fundamental social re-adjustments in our country can be measured—or resolved. Progress does not move along a line of linear advance but rather in some cyclical process, a distinguished American historian observes.[8]

And, lest we forget—the fortunes of civil rights for the Negro are inextricably inter-related to the civil liberties of all Americans! In an exposition "To Be Equal", Whitney M. Young, a foremost Negro spokesman, correctly sums it up: "The negro is a barometer of whether or not the American free enterprise system really works." I think it was Herbert Spencer who insisted that: "we cannot be moral unless [until] all are moral, we cannot be happy

unless [until] all are happy, we cannot be free unless [until] all are free".

The challenge is upon everybody to establish the justice of the Negro's many grievances—it is essential to racial peace. The problem must be solved by all possible skills of citizenship and government—this includes the judicial branch so far as it lies in its competence.[9]

"Every continent has its own great spirit of place. . . . Every people is polarized in some particular locality", said D. H. Lawrence. But the spirit of America transcends geography and the life of our people is polarized in "the supreme law of the land." The center of gravity of the organic functioning of our body politic resides in the Constitution—its dynamic is the imperative of equality in freedom.

In an "optative mood"—in Emerson's phrase—we discern that "at the end of the long corridor of night a crack shows beneath the door". Let us not close it. Let us rather open it wide. Too many have waited too long for too little! And let us not be afraid to listen to the voice of a new *experience*—not of a mere *idea*—the vibration of the stirring of the homunculus of the new epoch in our developing civilization—the reality of equality, not the concept alone.[10]

It has been remarked that the basic difference between the Negro protest in our country and in Africa—is that here it is not revolutionary; in a deep sense it is conservative. The negro is not agitating for a new social order but for his fulfilment in that which already exists—and of which he has a fundamental right to be an integral part.

And the "American Dilemma" can be resolved only by recognizing his inalienable right "to be equal".

In the continuing dialogue that goes on between the present and the past to shape the future, we must speak our part according to the light—and opportunity—given to us. Let us honor the call "so to speak and so to do as they shall be judged by the law of liberty."

I would reverse the convictions, remit the fines and dismiss the informations.

FOOTNOTES

1. The Sonhedrin at Usha ordained that no member could be excommunicated for his views regardless of circumstances. My revered ancestor, Rabbi, Judah Loewe (1512-1609) of Prague, who was a most passionate defender of his people and its faith in numerous dialogues declared: "One ought not reject the words of an opponent. It is preferable to seek them out and study them. Thus shall a person arrive at the * * * full truth * * *."

In a 6000 word dissent, Mr. Justice Storey wrote in The Nereide, 13 U. S. 388, 455: "* * * I hold it an indispensable duty not to surrender my own judgment, because a great weight of opinion is against me, a weight which no one can feel more sensibly than myself."

2. Subdivision 2 proscribed acts which annoy, disturb, interfere with, obstruct or are offensive to others; subdivision 3, congregating with others on a public street and refusing to move on when ordered by the police. The term "congregating" implies "a considerable number of persons * * * or a crowd * * * and a crowd has been defined as a throng, multitude or great number of persons * * *" (People v. Carcel, 3 N Y 2d 327, 333).

3. We must be scrupulous to permit such free expression not only to abort violence but even *non*-violent resistence [sic]. Civil disobedience has a long history—going back to Ghandi, and beyond him to Tolstoy and Thoreau. The incarnation of its spirit is best expressed in the Indian word "satyagraha". This connotes not a merely negative aspect, but a dynamic one. When civil disobedience, however, involves an infraction of statute not within constitutional protection (See, Cantwell v. Conn., 310 U. S. 396), those exercising it must, in good conscience—by their own discipline—be willing to submit to the sanctions of our civil authority. But we, who are called upon to vindicate such penal sanctioning, must be discreet and sure that such an infraction has in fact occurred—beyond a reasonable doubt, a norm which obtains in all criminal cases.

4. "This idea of a fair trial has been the greatest contribution made to civilization by our Anglo-American polity. Our liberties are not based on general indeterminate phrases. They are based on practical legal rules." From an address by Professor Goodhart at the Harvard Club on June 4 under the sponsorship of American Foreign Law Association and the foreign law committee of the Association of the Bar of the City of New York.

And Brandeis wrote: "In the development of our liberty insistence on procedural regularity has been a large factor" (Burdeau v. McDowell, 256 U. S. 465, 477). Frankfurter added: "The history of liberty has largely been the history of observance of procedural safeguards" (McNabb v. United States, 318 U. S. 332, 347).

5. Study of the report on discrimination in employment of the Senate Committee on Labor and Public Welfare (Report #867, 88th Cong., 2nd session, 1964) on behalf of the Association of the Bar of the City of New York led two of its committees to observe:

> "The reports indicate that non-whites earn significantly less than whites of lesser training and are frequently compelled to accept unskilled or semi-skilled jobs at low wages-jobs which are being wiped out at an accelerating pace by automation. They find that there has been disproportionately high unemployment levels of non-whites, who comprise 11% of the labor force but 22% of the unemployed." (Report on Proposed Fed. Leg. Relating to Equal Employment Opportunity by The Committee on Fed. Leg. and the Comm. on Labor & Soc. Sec. Legislation, Record, Vol. 19, #5, pp. 231-232; see also matter of Hughes—Tool Co., N. L. R. B., decision 7/2/64; Steele v. Louisiana & Nashville R. R., 323 U. S. 192; Colorado Commission v. Continental, 372 U. S. 714.)

6. The several complaints, as amended on the trial, charged that the defendant named had placed himself in a sitting position in the roadway, obstructing the free passage of vehicular traffic and had used loud and boisterous language, causing a crowd to collect; and that the complaining police officer stated in each case that he had asked the defendant to move out of the roadway on several occasions and that the defendant had refused.

"Convictions upon a charge not made would be sheer denial of due process." (DeJonge v. Oregon, 299 U. S. 353, 362.)

7. Thus it has been clear for a long time that the freedoms of the First Amendment are obligatory upon the States by virtue of the Fourteenth Amendment. It would seem that a new era is faintly dawning. The colloquy of these great canons consulting together seems to be broadening the concept of "state action" to comprehend state *in*action as well. That is to say, when a state *fails* to accord equality or due process in the exercise of the guarantees of the First

Amendment by legislation or decision, the Supreme Court may act mandatorily or by inhibition to fill the void. Congress, too, can act. Thus, the Federal legislation would be dealing with State conduct which includes *in*action. Such inaction is as much proscribed by the Fourteenth Amendment as affirmative action, if it results in a denial of equal protection of the laws. At least in part, the Civil Rights Law of 1964 is based on this premise; in any event, it can be supported on that predicate. At the National Conference of Trial Judges which met last year in conjunction with the Annual Meeting of the American Bar Association, Chief Judge Desmond urged abolition of Federal Court power to release State prisoners by *habeas corpus*, at the same time urging that Congress enact precise constitutional requirements for State courts to apply. He was right; for, as he said, the present system causes "much confusion, much delay and * * * increase in the business of already overburdened courts." That situation, however, was not the fault of the Federal Judiciary alone; State courts had been adhering to the outmoded rule in *Defore* before the Supreme Court overruled *Wolff* and adopted *Mapp;* there was a vacuum in procedural regularity which had to be filled by the *habeas corpus* expedient. This year, at the Conference of Chief Justices meeting in conjunction with the American Bar Association gathering, Judge Desmond again called for an "objective, thorough, calm, scholarly, scientific" study of the allocation of judicial power (New York Times, August 8 and 9, 1964). Mr. Justice Brennan called on State Judges "to share fully in the job of enforcing federal constitutional rights." He suggested that if the State courts acted more vigorously to do so, friction between them and the Supreme Court would be minimized.

8. In a review of "The Quest for the Dream" by John P. Roche, he adds: "Our 20th century history (is) a story of ethnic wars of various kinds, wars incidental to transforming the old America into a multi-ethnic, multi-religious urban society. For all but the Negroes, the largest battles have been won, and the Negroes themselves have launched at last upon a campaign of self-assertion which cannot be forever denied. . . . The brutality of yesterday was not even a response to any militancy on the part of American Negroes or to any improvement in the status of the race—it was merely an ugly response to their being there at all."

9. In a recent column, Walter Lippman says: "For an increasing number of Negroes their grievances are intolerable and will not be

endured very much longer. The essential point is to prove to the large mass of peaceable Negroes that there is light at the end of the tunnel. . . . The Negro community must be enabled to believe that the public authorities are their hope and not their enemy."

10. "It is hard to listen to a new voice as it is to listen to an unknown language. . . . Out of fear. . . . The world fears a new experience . . . (as it) doesn't fear a new idea. . . . It is the shifting over from the old psyche to something new, a displacement. And displacements hurt" ("Studies in Classic American Literature"—D. H. Lawrence).

APPENDIX B

Order Amending Remittitur

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* SARA E. PENN, HELENA L. LEVINE, BARBARA PLISKOW, EDWARD W. PITT, BENITA T. CANNON, CLAUDIO RAMOS, THOMAS McKENNA, MERYL CHATKIN, ISIDORE T. BLOOM, DAVID RIVERA and SAUL GOTTLIEB, Appellants.

Submitted September 20, 1965; decided September 23, 1965.

Motion to amend remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United Sttaes, viz.: Whether the rights of appellants under the First and Fourteenth Amendments were violated. Appellants contend that their conduct was protected as acts of free expression and that the convictions thereby violated the First and Fourteenth Amendments. They also contend that section 722 of the Penal Law, as applied to them, is unconstitutional. The Court of Appeals considered these contentions and held there was no deinal of appellants' constitutional rights. [See 16 N Y 2d 581.]